

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ZAINAB AHMED**

Claimant

V.

**TYSON FRESH MEATS, INC.**

Self-Insured Respondent

Docket No. 1,049,085

**ORDER**

Claimant requested review of Administrative Law Judge Pamela J. Fuller's January 10, 2014 Award. The Board heard oral argument on June 3, 2014.

**APPEARANCES**

Stanley R. Ausemus, of Emporia appeared for claimant. Carolyn McCarthy, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The parties agreed at oral argument that the Board may take judicial notice of the *AMA Guides*.<sup>1</sup>

**ISSUES**

The Award found claimant sustained a 13% permanent partial impairment to her left upper extremity at the level of the shoulder based upon Dr. Do's rating. Claimant requests the Award be modified to reflect a 36% whole body functional impairment based upon Dr. Murati's rating. Claimant asserts Dr. Do never examined her neck, but Dr. Murati did, and therefore argues Dr. Murati's impairment more accurately reflects her condition. Respondent maintains the Award should be affirmed.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

FINDINGS OF FACT

Claimant began working for respondent in August 2003.

On January 22, 2010, she filed an application for hearing in which she alleged a left shoulder injury that occurred on December 14, 2009. The listed cause of accident was "working meat packing."<sup>2</sup> Such application was amended on March 11, 2010, in order to reflect a December 28, 2009 date of accident.

On February 15, 2011, claimant was seen at her attorney's request by Pedro Murati, M.D., who is board certified in electrodiagnostic medicine, physical medicine and rehabilitation. Claimant complained of immediate pain in her left shoulder and neck when holding a hook in her right hand on December 28, 2009. Claimant had decreased left shoulder range of motion. Dr. Murati diagnosed claimant with a left rotator cuff sprain versus tear and myofascial pain syndrome of the left shoulder girdle, extending into the cervical and thoracic paraspinals. Using the *Guides*, Dr. Murati rated claimant at a 12% impairment to the left upper extremity at the level of the shoulder, a 5% impairment to the body as a whole based on Thoracolumbar DRE Category II and a 5% impairment to the body as a whole based on Cervicothoracic DRE Category II, for an overall impairment of 16% to the body as a whole.

On March 3, 2011, claimant amended her application for hearing a second time. She alleged a left shoulder, neck and back injury that occurred on December 14, 2009.

A prehearing settlement conference was held on September 12, 2011. The judge ordered an independent medical evaluation with Pat Do, M.D., who evaluated claimant on October 17, 2011. Claimant complained of occasional paraspinal neck pain and medial scapula pain. Dr. Do recorded claimant's left shoulder range of motion measurements. Review of a shoulder MRI showed some tendonitis, but no obvious abnormalities. Dr. Do noted claimant's thoracic spine was not tender. There is no indication Dr. Do examined claimant's cervical spine. Dr. Do's impression was that claimant had left shoulder pain with some impingement and some rotator cuff tendonitis.

Dr. Do assigned claimant a 13% impairment to the upper extremity pursuant to the *Guides*. In addressing claimant's neck complaints, Dr. Do stated:

Her neck pain is on occasion and is not unusual for muscles around the shoulder to go on a spasm to help protect an injured shoulder that also extends up into the neck. However, I do not think there is anything separately ratable for the neck.<sup>3</sup>

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<sup>2</sup> Application for hearing (filed Jan. 22, 2010).

<sup>3</sup> Do Report (filed Oct. 31, 2011) at 2.

Abdikani Noor testified on February 5, 2012. He is claimant's friend and acted as a translator during claimant's examinations with Drs. Do, Murati and Smith, a non-testifying physician. He testified claimant wore a burka – a thin, silk-like material that covers her head and neck – and at no time did Dr. Do ask her to remove the head scarf. Mr. Noor testified Dr. Do pushed on claimant's left hand while taking measurements of her elbow. Mr. Noor further testified that when claimant asked Dr. Do if he was going to examine her neck, the doctor replied, "What happened to your arm also affected on your neck."<sup>4</sup>

Mr. Noor testified Drs. Murati and Smith had her change into different clothing and examined her neck. Mr. Noor estimates the appointment with Dr. Do lasted about 15 minutes, but the appointments with Drs. Murati and Smith lasted 30-40 minutes.

Dr. Murati was authorized to perform an NCT/EMG on April 17, 2012. According to Dr. Murati, the NCT/EMG showed claimant had bilateral carpal tunnel syndrome (CTS).

Claimant amended her application for hearing a third time on July 13, 2012. She alleged injuries on December 28, 2009, involving her right arm, right hand, right wrist, left shoulder, neck and back.

On June 4, 2013, claimant was again seen at her attorney's request by Pedro Murati, M.D. Claimant reported left shoulder pain radiating down her arm, right shoulder and right wrist pain from compensating due to left upper extremity pain, neck and upper back pain and difficulty sleeping due to pain.

Dr. Murati's examination revealed equal muscle stretch reflexes (MSRs) to the bilateral upper extremities, mild instability of both wrists, positive bilateral shoulder rotator cuff and Hawkins examination, and impingement of both shoulders, mild on the right.

Regarding the left upper extremity, Dr. Murati's pinprick testing showed decreased sensation along the left upper extremity in a nonspecific pattern, claimant's left shoulder muscle strength was decreased secondary to pain, she had moderate glenohumeral crepitus of the left shoulder, and moderate atrophy of the left supraspinatus. Claimant had decreased left shoulder range of motion that was better than in 2011.

Dr. Murati's examination of claimant's right upper extremity revealed some strength loss, tender flexor nodules on the right 1st, 3rd, and 4th digits, moderate crepitus of the right wrist, and tenderness of the ulnar aspect of the right wrist.

Dr. Murati's neck examination revealed a positive Spurling's examination on the left with diminished range of motion in the neck. Trigger points of the left shoulder girdle extended into the cervical and thoracic paraspinals.

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<sup>4</sup> Noor Depo. at 9.

Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome, tenosynovitis of the right 1st, 3rd and 4th digits, bilateral rotator cuff tear versus sprain, probable right TFCC tear and myofascial syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals. Dr. Murati noted claimant's right shoulder and wrist pain was secondary to her compensating for her left upper extremity pain. Dr. Murati recommended at least yearly follow-ups on claimant's bilateral upper extremities, neck, and upper back.

Dr. Murati provided various restrictions that are perhaps best described as permitting light duty work. Further, using the *Guides*, Dr. Murati assigned a 36% whole person impairment as follows:

- 13% right upper extremity impairment for the tenosynovitis of the 1st, 3rd and 4th digits, using tables 18 and 29;
- 12% right upper extremity impairment for right wrist crepitus, using tables 18 and 19; and
- 10% right upper extremity impairment for right carpal tunnel syndrome, using table 16.
- 10% left upper extremity impairment for left carpal tunnel syndrome, using table 16; and
- 11% left upper extremity impairment for left shoulder range of motion deficits, using figures 38, 41 and 44.
- 5% whole person impairment for myofascial pain syndrome affecting the cervical paraspinals using Cervicothoracic DRE Category II; and
- 5% whole person impairment for myofascial pain syndrome affecting the thoracic paraspinals using Thoracolumbar DRE Category II.

The right upper extremity impairments combine for a 31% right upper extremity impairment which converts to a 19% whole person impairment. The left upper extremity impairments combine for a 20% left upper extremity impairment which converts to a 12% whole person impairment. Combining<sup>5</sup> whole body impairments of 19%, 12%, 5% and 5% results in the 36% whole body rating.

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<sup>5</sup> Under the *Guides*, adding and combining impairments are different functions. A combined rating is derived from the Combined Values Chart starting on page 322 of the *Guides*. An example shows a 35% impairment combined with a 20% impairment results in a 48% impairment (not added to get 55%).

A second prehearing settlement conference was held August 13, 2013. The administrative record contains a notice of the hearing, but no contemporaneous record of what transpired. Based on statements of counsel, it appears the judge suggested a court ordered evaluation with Terrence Pratt, M.D., but claimant voiced no interest in attending such evaluation. No evaluation with Dr. Pratt was ever ordered by the court.

Claimant amended her application for hearing a fourth time on August 16, 2013. She alleged injuries on December 28, 2009, which involved her neck and back, as well as her bilateral shoulders, arms, wrists and hands.

Dr. Murati testified on September 27, 2013. When cross-examined, Dr. Murati acknowledged he referred to claimant in his February 15, 2011 report as being a male, but indicated it was an error based on his associating the name "Ahmed" as a man's name. He noted the patient identified in his reports is the same person based on the same social security number.

Dr. Murati testified that he believed he palpated claimant's cervical and thoracic paraspinals through her burka, which was thin or light enough to allow him to palpate the underlying structures and feel trigger points based on his training.

The regular hearing occurred on November 4, 2013. Claimant testified that on December 28, 2009, she was pulling a big piece of meat when she experienced pain in her left shoulder and neck. She reported the incident to the company nurse who had her change jobs to one where she used her right hand. She testified she was told not to use her left hand. She continued working, but began having pain in her upper back, right shoulder, right arm and right hand. Claimant testified she received medications, injections and physical therapy for her neck and left shoulder. She later received an injection in her right wrist.

Claimant still works full-time for respondent checking stickers on boxes. She testified her current symptoms consist of constant pain in her neck and right shoulder extending down her arm into her right wrist. Her right shoulder pops and she has difficulty raising her right arm above 90°. She testified she has popping and constant pain in her right hand. She experiences constant pain from the left side of the neck and head, extending down across the left shoulder, down the left arm and into the hand. She can barely raise her left arm and her left shoulder pops. She takes ibuprofen for her left shoulder and has difficulty sleeping as a result of her pain. She testified that due to the constant pain in her neck, she is unable to move her head to the left and has difficulty moving it up and down. She ranked all of her pain complaints as an 8 or higher based on a scale in which 10 represents the highest level of pain. She denied having any of these problems prior to working for respondent.

Claimant testified all the doctors, excluding Dr. Do, had her remove her burka before examining her. Dr. Do did not examine her neck, nor did he ask her to remove the head scarf. When she asked Dr. Do if he was going to check her neck, he told her “the problem that you have on your shoulder goes straight to your neck.”<sup>6</sup>

Claimant acknowledged that if the court would have ordered a neutral evaluation with Dr. Terrence Pratt, she would have refused to attend:

Yes, I - - I - - I couldn't go there because the doctor that you guys sent me to, Dr. Do, I didn't get what I asked him I said the neck to check for me. I asked him to check my neck and, yeah, he didn't do. So the court order if it requested from me for that I couldn't go because I think the same thing's going to happen what happened at Dr. Do.<sup>7</sup>

Judge Fuller issued the Award on January 10, 2014, as follows:

The claimant was evaluated for her left upper extremity difficulties pursuant to a court order in 2011, by Dr. Do. Subsequent to that, she amended her E-1 to include injury to her right upper extremity. The claimant did receive limited treatment. She was evaluated by Dr. Murati on 3 occasions at the request of claimant's counsel, the last being in 2013. Due to the large difference in Dr. Do's rating and Dr. Murati's final rating, this court attempted to order an evaluation by Dr. Pratt. The claimant refused to attend a court ordered evaluation stating that she was satisfied with Dr. Murati's rating. This statement was made at the Pretrial. At the regular hearing, she testified that she refuse[d] to attend because she was afraid it would be like the previous court ordered evaluation. Dr. Murati's rating included the right upper extremity as well as ratings for her cervical and thoracic areas. Dr. Do did not find that the claimant even had tenderness in the thoracic spine when he examined her. This court finds Dr. Do's evaluation to be the most reliable as he was court ordered. Further, the claimant should not be allowed to allege that the original court ordered evaluation was poor and that she was not fully examined, then refuse to attend a second evaluation which would have been conducted subsequent to all her treatment being completed. Therefore, as a result of her accidental injury arising out of and in the course of her employment, the claimant suffers a 13% permanent partial impairment to the left upper extremity at the level of the shoulder.<sup>8</sup>

Thereafter, claimant filed a timely appeal.

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<sup>6</sup> R.H. Trans. at 11.

<sup>7</sup> *Id.* Trans. at 26.

<sup>8</sup> ALJ Award (Jan. 10, 2014) at 5.

**PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>9</sup> Claimant bears the burden of proving his or her right to an award based on the whole record under a “more probably true than not true” standard.<sup>10</sup>

K.S.A. 2009 Supp. 44-508(d) states that an “accident” is:

... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>11</sup> The phrases arising "out of" and "in the course of" employment are conjunctive with separate and distinct meanings; each condition must exist before compensation is allowable:

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>12</sup>

K.S.A. 44-510d(a) states in part:

If there is an award of permanent disability . . . compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

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<sup>9</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>10</sup> *Id.* and K.S.A. 2009 Supp. 44-508(g).

<sup>11</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>12</sup> *Id.*

. . .

(13) For the loss of an arm, . . . including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-519 states:

[N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act . . . shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.



K.S.A. 2009 Supp. 44-551(i)(1) provides in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2009 Supp. 44-555c(a) provides:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

From July 1, 1993 forward, the Board assumed the de novo review of the district court.<sup>13</sup> Board review of an administrative law judge's order is de novo on the record.<sup>14</sup> "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."<sup>15</sup> De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.<sup>16</sup>

Permanent partial disability benefit determinations are based on the location of the impairment, not on the situs of injury.<sup>17</sup> "It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."<sup>18</sup> The Board "is free to consider all of the evidence and decide for itself the percentage of disability."<sup>19</sup>

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<sup>13</sup> See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

<sup>14</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>15</sup> *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

<sup>16</sup> *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

<sup>17</sup> See *Fogle v. Sedgwick County*, 235 Kan. 386, 386, 680 P.2d 287 (1984) ("It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state."); see also *Bryant v. Excel Corp.*, 239 Kan. 688, 692, 722 P.2d 579 (1986) (same).

<sup>18</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>19</sup> *Id.* at 784.

### ANALYSIS

The only issue concerns the nature and extent of claimant's disability. However, determining such issue is dependent on the evidence properly before us. Additionally, it appears the judge's determination of claimant's disability was tied to a finding claimant refused to attend a second court ordered evaluation, which we will address.

The parties' briefs reference medical records and opinions that are not properly in evidence. Claimant notes Dr. Smith provided a 5% whole body rating based on claimant's upper back and neck. Respondent asserts Dr. Smith's rating is not part of the evidence and Dr. Smith never testified. On the other hand, respondent directly quotes or summarizes what appear to be physician interpretations of imaging studies, such as claimant's left shoulder MRIs and a cervical spine MRI, as well as opinions from Drs. DeCarvalho, Smith, Plomaritis and Steffen. These doctors, as well as doctors interpreting imaging studies, did not testify.

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians, so long as the testifying physician expresses his or her own opinion rather than the opinion of the absent physician:

[K.S.A. 44-519] literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence. In the present case, no report or certificate prepared by an absent, nontestifying physician or surgeon was introduced into evidence. Neither [doctor] attempted to 'bootleg in' the opinion of an absent, nontestifying doctor by merely reading from the other doctor's report. See, e.g., *Mesecher v. Cropp*, 213 Kan. 695, 701–02, 518 P.2d 504 (1974). Although each doctor relied in part on the reports of the absent doctors in forming his opinion, each doctor, when testifying, expressed his own opinion and not that of the absent, nontestifying doctors."<sup>20</sup>

K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. A physician's reliance upon a medical record authored by a non-testifying physician does not make the non-testifying physician's opinion admissible.<sup>21</sup> "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination, and if this is to be changed, we believe the legislature should do so and not this court."<sup>22</sup> K.S.A. 44-519 is a specific legislative mandate that must be followed, not simply a technical rule of evidence.<sup>23</sup>

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<sup>20</sup> *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

<sup>21</sup> See *Brady v. State of Kansas*, No. 1,050,052, 2011 WL 2185267 (Kan. WCAB May 6, 2011).

<sup>22</sup> See *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 282, 949 P.2d 613 (1997).

<sup>23</sup> *Id.* at 278.

Both parties seem to pick and choose what medical opinions they want as part of the record, but object to the inclusion of medical opinions detrimental to their positions. As noted above, respondent disputes that Dr. Smith's report is properly in evidence. Respondent also asserts that opinions from treating doctors are properly in evidence because such doctors did not provide impairment rating opinions. Claimant argues Dr. Smith's opinion is in evidence because Dr. Murati testified about Dr. Smith's rating and quoted Dr. Smith's opinion in his report, with no objection from respondent. To accept such argument, the Board would need to view K.S.A. 44-519 as a mere evidentiary rule and not as a legislative mandate, as noted in *Roberts*.

Both parties are trying to "bootleg in" opinions from absent, non-testifying physicians. K.S.A. 44-519 makes no distinction between experts hired to provide impairment rating opinions and opinions from treating doctors. Absent agreement by the parties, such opinions do not come into evidence under the statute. The presence of non-testifying physician opinions being contained in testifying physician reports does not allow the non-testifying physician opinions to be considered evidence. Based upon K.S.A. 44-519, *Roberts*, *Enloe* and K.A.R. 51-3-5a, the opinions of Drs. DeCarvalho, Smith, Plomaritis and Steffen, as well as what appear to be physician interpretations of imaging studies, are all not part of the evidence. The medical evidence is limited to opinions from Drs. Do and Murati, and the Award properly limited discussion of medical opinions to medical reports that are actually in evidence and supported by physician testimony.

There is some discussion in the briefs that the judge ordered an independent medical evaluation for claimant with Terrence Pratt, M.D., and claimant refused to attend such evaluation. The Award, when discussing the nature and extent of claimant's disability, noted claimant should not be allowed to refuse to attend the evaluation. To be perfectly clear, the judge **did not** order a second independent medical evaluation. The judge apparently suggested an IME and claimant, apparently through an interpreter, indicated a contrary preference.<sup>24</sup> Claimant later testified she did not want a second IME because she believed the second doctor would ignore her complaints as was her allegation against Dr. Do. In any event, there was no order for a second neutral IME. While a neutral evaluation may have been helpful, the Board concludes claimant's entitlement to benefits is not impacted by her reluctance to attend an evaluation that was simply never ordered.

Therefore, we give no consideration to medical reports and opinions not properly in evidence. Claimant's preference to not attend an IME that was never ordered has no bearing on what compensation she may be entitled to receive based on the actual evidence. The Board's only consideration is between two divergent medical opinions, those of Drs. Do and Murati.

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<sup>24</sup> Claimant's attorney indicated at oral argument that his client was opposed to attending an evaluation with Dr. Pratt and he strongly encouraged her to attend any second court-ordered IME.

Dr. Do opined any problems claimant has with her neck are the result of her left shoulder injury. Dr. Do's report fails to reflect any examination of claimant's neck, despite claimant complaining to him about her neck. Claimant and Mr. Noor testified that Dr. Do did not evaluate her neck. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."<sup>25</sup> The Board finds this testimony was never contradicted and is trustworthy. Under *Anderson*, such testimony is conclusive.

Depending on the evidence, the Board has previously concluded that a claimant's neck difficulties are secondary to a shoulder injury, rather than representing a separate impairment,<sup>26</sup> but has also found referred neck pain from the shoulder can also result in cervical spine impairment.<sup>27</sup> While there may not be a general rule, it appears in cases reaching the former conclusion, a physician's supporting opinion was at least based on an examination of all of claimant's physical complaints, including both the shoulder and neck.<sup>28</sup> The Board has often given credence to the opinions of court-ordered physicians, but Dr. Do simply did not evaluate claimant's neck. It is difficult to give much weight to Dr. Do's belief that claimant has no neck impairment when he did even not examine her neck.

The Board notes that Dr. Murati testified he examined claimant's neck through her cloth burka, while claimant testified Dr. Murati had her remove her burka to evaluate her. While this is an inconsistency, they both testified Dr. Murati evaluated her neck. The only medical report in evidence concerning an evaluation of claimant's cervical spine is that of Dr. Murati. As such, the Board adopts Dr. Murati's opinion that claimant has a 5% whole body impairment on account of her neck injury. Apart from Dr. Do's speculation – without examination – that claimant's neck problems stem from her shoulder injury, there is insufficient evidence to counter Dr. Murati's opinion regarding the permanency of claimant's neck impairment.

The Board rejects Dr. Murati's opinion that claimant has a 5% whole body impairment based on Dr. Murati's detection of thoracic trigger points or spasms. Dr. Do actually did examine claimant's thoracic spine and made no such findings, instead noting claimant was not tender in such area. Claimant did not meet her burden of proving mid-back or thoracic impairment.

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<sup>25</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

<sup>26</sup> See *Barrow v. J. T. Thorpe & Son, Inc.*, No. 1,051,690, 2013 WL 5983242 (Kan. WCAB Oct. 29, 2013); *Hernandez v. Sodexo*, No. 1,048,249, 2011 WL 4011671 (Kan. WCAB Aug. 31, 2011); *Torkelson v. Walmart*, No. 1,043,238, 2010 WL 5579600 (Kan. WCAB Dec. 17, 2010); and *Ney v. General Finance, Inc.*, No. 1,037,855, 2010 WL 3489640 (Kan. WCAB Aug. 26, 2010), *aff'd* No. 104,976, 2012 WL 223919 (Kansas Court of Appeals unpublished opinion filed Jan. 20, 2012).

<sup>27</sup> *Valesano v. Stormont-Vail Regional Medical Center*, No. 1,050,725, 2012 WL 2890465 (Kan. WCAB June 22, 2012).

<sup>28</sup> See *Ney*, *Barrow* and *Torkelson*, *supra*.

The Board cannot tell from the record when claimant's wrist and hand injuries began. We cannot tell when claimant was limited to right arm duties, but her testimony suggests such restrictions came about shortly after the December 28, 2009 accident. Dr. Murati did not diagnose bilateral CTS, right wrist crepitus or tenosynovitis of the right fingers at his February 2011 evaluation of claimant. Dr. Do did not mention or examine these complaints, likely because claimant did not raise them until later.

In any event, Dr. Murati's report noted claimant's complaint that her right upper extremity impairment was the result of using her right arm and favoring her left arm. Claimant basically testified her right arm complaints came about from being restricted from using her left arm. Dr. Murati testified claimant has bilateral CTS as confirmed by objective testing. These pieces of evidence are not contradicted. So too, Dr. Murati's causation opinion regarding the development of claimant's right upper extremity impairment is not contradicted. As such, the Board adopts Dr. Murati's opinions regarding claimant's right upper extremity functional impairment.

In assessing the nature and extent of claimant's disability, we conclude claimant failed to prove her December 28, 2009 accident either directly or indirectly resulted in left CTS and associated permanent impairment. Dr. Murati did not diagnose left CTS when he evaluated claimant on February 15, 2011. Without a doubt, claimant has left CTS, as verified by a NCT/EMG. However, claimant only alleged a singular date of accident. Different from her allegation that she developed right-sided upper extremity impairment over time when she was precluded from using her left arm, she did not allege she developed left CTS due to repetitive work over any duration of time before or after December 28, 2009. Claimant provided insufficient proof as to how she developed left CTS. She may have developed left CTS at work before being restricted against using her left arm or perhaps she developed left CTS away from work. We simply do not know based on the evidence. When considering what was alleged, claimant's testimony and the medical evidence, it is difficult to conceive how claimant developed left CTS if she was precluded from using her left arm.

To summarize, claimant proved right upper extremity impairment, including right CTS due to overcompensating as a direct result of not using her left arm, left shoulder impairment, and cervical impairment. She did not prove thoracic impairment or impairment associated with left CTS.

Claimant's right upper extremity impairment, when converted to the body as a whole is 19%. Claimant's 11% left upper extremity impairment, as based on the shoulder only, when converted to the body as a whole is 7%.<sup>29</sup> Combining a 19% whole body impairment with a 7% whole body impairment with a 5% impairment for claimant's cervical spine results in claimant having proved a 29% impairment to the body as a whole.

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<sup>29</sup> See *Guides* at p. 20 (Table 3).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds:

1. the medical evidence is limited to the opinions of Drs. Do and Murati;
2. claimant did not refuse to attend a court ordered evaluation with Dr. Pratt because no such evaluation was ever ordered; and
3. the Award should be modified to reflect that claimant proved an overall whole body impairment of 29%, as summarized above. Claimant did not prove work-related thoracic spine or musculature impairment or left CTS impairment.

All other findings of the judge not inconsistent with these conclusions are affirmed.

**AWARD**

**WHEREFORE**, the Board modifies the January 10, 2014 Award to find claimant proved a 29% whole body impairment.

Based upon an average weekly wage of \$537.75, claimant is entitled to receive 6.57 weeks of temporary total disability benefits at \$358.52 per week, or \$2,355.48, followed by 120.35 weeks of permanent partial disability benefits at \$358.52 per week, or \$43,147.88, for a 29% functional impairment to the body as a whole, making a total award of \$45,503.36. This entire award is due and owing and ordered paid in one lump sum, less any amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2014.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

ec: Stanley R. Ausemus  
kathleen@sraclaw.com

Carolyn McCarthy  
cmccarthy@mwklaw.com

M. Joan Klosterman  
jklosterman@mwklaw.com  
jrieder@mwklaw.com

Honorable Pamela J. Fuller